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Supreme Court, U.S.
FILED
DEC 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-858

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARK REEDER,
Petitioner,

vs.

KANSAS CITY BOARD OF POLICE COMMISSIONERS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KARL F. SCHMIDT
MORRISON, HECKER, CURTIS, KUDER & PARRISH
1700 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106-2370
(816) 842-5910

J. EMMETT LOGAN (*Counsel of Record*)
MORRISON, HECKER, CURTIS, KUDER & PARRISH
14 Corporate Woods
8717 West 110th Street, Suite 520
P.O. Box 25217
Overland Park, Kansas 66225-5217
(913) 345-2700
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY RULE THAT THE MISSOURI STATE LEGISLATURE MAY LIMIT TO A CERTAIN POLITICAL SUBDIVISION OF THE STATE THE APPLICATION OF RESTRICTIONS ON POLITICAL ACTIVITIES OF POLICE OFFICERS AND EMPLOYEES, WITHOUT DEPRIVING PETITIONER OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The opinion petitioner seeks to have reviewed herein is reported at 796 F.2d 1050 (8th Cir. 1986). In addition, the Supreme Court of Missouri has rendered an opinion deciding an issue identical to that raised by petitioner. *Pollard v. Board of Police Commissioners,* 665 S.W.2d 333 (Mo. 1984). On July 1, 1985, this Court denied a Petition for Writ of Certiorari that sought review of that decision. *Pollard v. Board of Police Commissioners,* ..... U.S. ....., 87 L.Ed.2d 657 (1985).

STATEMENT OF THE CASE

The Missouri State Legislature exercises jurisdiction over the police departments of its two largest cities, St. Louis and Kansas City, through separate state statutes that create gubernatorially appointed boards of commis-

sioners to administer the operations of each. *See* Mo. Rev. Stat. § 84.010, *et seq.;* Mo. Rev. Stat. § 84.350, *et seq.* The two boards have a common historical origin. Both were created in 1861 under similar enactments. 1861 Mo. Laws Reg. Sess. 446-53; 1861 Mo. Laws Spec. Sess. 63-67. However, in 1932 the historical paths of the two departments diverged, when the Supreme Court of Missouri held that the statute applicable to Kansas City constituted an unconstitutional delegation of legislative power to an administrative agency. *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (1932) (en banc). As a result, the Kansas City Police Department was returned to home rule, while the St. Louis department remained under state control. The events that occurred between 1932 and 1939, when the legislation that is the subject of this litigation was enacted, permanently distinguished the police departments of the two cities from one another.

Local control of the Kansas City Police Department between 1932 and 1939 was the key to the development and prosperity of the political machine of Thomas J. Pendergast. During that period, the politically controlled police force permitted, protected, and participated in vote fraud, ballot stuffing, ghost voting, and voter intimidation to such an extent that the machine was able to determine the outcome of elections not only within Kansas City, but throughout the entire state. App. 172, 260, 272, 275, 276-78, 323, 342-43, 345. The machine maintained its lock on the Kansas City police department through the operation of a patronage system which controlled employment on the force and advancement within the ranks. App. 40, 132, 179-89, 259, 343-44. Police recruits gained employment by pledging allegiance to the machine and were bonded to the politicians through a system of forced contributions.

App. 40, 134-35, 337. The restriction on political contributions of which petitioner complains was passed in direct response to the evils generated by that system. App. 339-350.

While the Kansas City Police Department was operated under local political control, it gained a wide-spread reputation for selective law enforcement geared solely toward furthering the interests of the politicians in power. The department protected violent criminals at the request of the machine. App. 268, 321. As a result, Kansas City had the highest homicide rate of the 15 largest cities in the United States. App. 306. The department permitted and protected gambling, prostitution, narcotics rings, and other forms of organized crime. App. 36-38, 266-70, 283, 293, 294; 39-40, 61-62, 267, 310-12; 309, 310. As a result, Kansas City gained a reputation as the "widest open town in the USA" where "anything goes". App. 267. But during that same period, the St. Louis Police Department became known as one of the two best in the country. App. 293, 294, 305, 313. Therefore, when the Missouri Legislature considered measures to eliminate political influence in the Kansas City Police Department, and the corruption that flowed from that influence, there was no need to take similar remedial action with respect to St. Louis.

The Kansas City Police Department was returned to state control in 1939. The statute by which that was accomplished required all members of the department to refrain from participation in any "partisan political activity". Mo. Rev. Stat. § 7645 (1939). In 1943, the statute was amended to its current form in response to a referendum under which the people of Kansas City adopted a City Charter that includes a proscription against polit-

ical contributions by city employees. That proscription is identical to the one contained in Mo. Rev. Stat. § 84.830. App. 371, 375 (Kansas City Charter, § 126); 1943 Mo. Law p. 727, § 7681.

Petitioner is a sergeant of the Kansas City Police Department. In July of 1982 he made a $500 public partisan political contribution to the Carnes for Congress Committee, the campaign committee of John Carnes, a candidate for the United States Congress in Missouri's Fifth Congressional District. App. 17-18. He thereby violated Mo. Rev. Stat. § 84.830.1 and is subject to discharge from the force pursuant to Mo. Rev. Stat. § 84.830.7. Below, petitioner raised challenges to the enforcement of those provisions against him under the First Amendment, under the equal protection clause of the Fourteenth Amendment, and under the theory that the statute is preempted by the Federal Election Campaign Act. In two separate opinions, the Eighth Circuit has rejected each of those challenges. However, the Petition for Writ of Certiorari seeks review only of the decision by which the Eighth Circuit ruled that § 84.830 does not deprive petitioner of equal protection. Thus, petitioner has abandoned his First Amendment and preemption claims.

SUMMARY OF ARGUMENT

Petitioner has cited no "special and important reasons" within the purview of Rule 17 of the rules of this Court for granting review of this case by Writ of Certiorari. The Court has previously denied certiorari in a case that included the identical equal protection issue raised by petitioner. Further, Petitioner has set forth no evidence or argument that the decision of the Eighth Circuit rejecting Petitioner's equal protection challenge bears upon any issue

of national significance. Finally, the issues raised by Petitioner's equal protection argument have previously been decided by this Court. The decision of the Eighth Circuit is in complete accord with those prior decisions.

REASONS FOR DENYING THE WRIT

I. THE COURT HAS PREVIOUSLY DENIED A REQUEST TO CONSIDER THE IDENTICAL EQUAL PROTECTION QUESTION PRESENTED BY THE PETITION.

Roger Pollard is also a sergeant of the Kansas City Police Department. Like petitioner, Sgt. Pollard made a public partisan political contribution to the Carnes for Congress Committee in July of 1982. Based upon that contribution, the Board of Police Commissioners commenced disciplinary proceedings against Sgt. Pollard identical to those commenced against Petitioner. Sgt. Pollard filed suit in the Circuit Court of Jackson County, Missouri seeking to enjoin those proceedings. The constitutional issues raised by Sgt. Pollard in state court were identical to those raised by petitioner in federal court.[1]

In March of 1984, the Supreme Court of Missouri upheld § 84.830 against Sgt. Pollard's constitutional challenges. The court's opinion specifically rejected the argument that § 84.830 violates equal protection because the application of its restrictions is limited to Kansas City

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1. On September 30, 1982, the state circuit court conducted an evidentiary hearing on Sgt. Pollard's request for injunctive relief. The *Reeder* case was originally submitted to the federal district court on the basis of the record developed at that hearing, as supplemented by a Stipulation of Fact identifying the parties, establishing jurisdiction, and showing the basic occurrences out of which the controversy had arisen. App. 17-189.

police officers and employees. *Pollard v. Board of Police Commissioners, supra,* 665 S.W.2d at 342. Sgt. Pollard, represented by the same attorneys representing petitioner herein, chose to forego his right to appeal that decision under 28 U.S.C. § 1257(2) and, on June 16, 1984, filed a Petition for Writ of Certiorari. *See* Case No. 83-2076. Sgt. Pollard's Petition included the following question presented for review:

> II. Does R.S. Mo. § 84.830 (1978), Which Only Prohibits Political Contributions by Kansas City Police Officers, Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution Because Only Kansas City Police Officers are Prohibited from Making Such Contributions While No Police Officers in Other Missouri Cities are Subject to Such a Statutory Prohibition?

On July 1, 1985, the Court entered an Order denying that Petition. *Pollard v. Board of Police Commissioners,* ..... U.S. ....., 87 L.Ed.2d 657 (1985).

Petitioner has cited no evidence that the circumstances under which the *Pollard* Petition was considered have changed since the Court ordered its denial. While the basis of the Eighth Circuit's equal protection decision differs from that of the Supreme Court of Missouri the underlying issue considered in both cases is identical. Therefore, like in the *Pollard* case, there are no "special and important reasons" to warrant the grant of certiorari herein.

II. PETITIONER HAS NOT DEMONSTRATED THAT THE DECISION OF THE COURT OF APPEALS BEARS ON ANY ISSUE OF NATIONAL SIGNIFICANCE.

The circumstances under which the prohibition against political contributions by Kansas City police officers and employees was enacted are unique to the State of Missouri. Missouri is the only state wherein local police departments are currently operated under state control. There exists elsewhere no parallel to the police departments of St. Louis and Kansas City, the former which has consistently maintained an outstanding reputation, the latter whose image has been permanently burdened by its former ties to a corrupt political regime. Therefore, the basis on which Mo. Rev. Stat. § 84.830 was enacted applies only within the State of Missouri. While the decision herein is critical to the maintenance of the image and integrity of the Kansas City Police Department and essential to the preservation of the right of the Missouri State Legislature to prescribe the terms and conditions of governmental employment, petitioner has shown no demonstrable impact the decision might have outside of Missouri's borders. Moreover, petitioner cannot argue that the decision to limit the application of § 84.830 to Kansas City police officers and employees impacts upon any federally protected interest of individuals within the state. *Cf. Clements v. Fashing*, 457 U.S. 957 (1982) (Stevens, J. concurring).

The Eighth Circuit's first opinion herein held that § 84.830 does not violate the First Amendment and is not preempted by the Federal Election Campaign Act. *Reeder v. Board of Police Commissioners*, 733 F.2d 543 (8th Cir. 1984). Petitioner has not sought review of that holding.

Therefore, it is established that, had the prohibition against political contributions at issue been promulgated by the Kansas City Board of Police Commissioners under the authority delegated to it pursuant to Mo. Rev. Stat. § 84.420.2 (1), even the argument asserted by petitioner herein would create no equal protection issue. The question presented by the Petition for Certiorari can thus be distilled to whether it is a violation of the United States Constitution for a state legislature to enact a regulation which clearly could have been adopted locally under a delegation of authority. The Court has previously answered that question.

In *Salsburg v. Maryland*, 346 U.S. 545 (1954), the defendant had been convicted, with the aid of evidence seized in violation of the Fourth Amendment, of breaking state gambling laws. He claimed to have been denied equal protection because, under state statute, the evidence would have been excluded in counties other than the one in which he was tried. In rejecting that challenge, the Court stated:

> There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. *It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each.* Territorial uniformity is not a constitutional requisite.

Id. at 552 (emphasis supplied). This holding establishes that the procedural issue of which state legislative body promulgates an otherwise valid local regulation implicates no federally protected interest under the equal protection clause of the Fourteenth Amendment. The "equal protection clause certainly was not intended to require the

States to justify every decision concerning the terms and conditions of state employment according to some federal standard." *Clements v. Fashing, supra* at 975 n.4 (Stevens, J. concurring).

III. IT IS SETTLED BY PRIOR DECISIONS OF THIS COURT THAT THE DETERMINATION OF THE MISSOURI STATE LEGISLATURE TO LIMIT THE APPLICATION OF MO. REV. STAT. § 84.830 TO KANSAS CITY POLICE OFFICERS AND EMPLOYEES DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION.

A. The Territorial Classification Created by Mo. Rev. Stat. § 84.830 Is Not Subject to Review Under the Equal Protection Clause of the Fourteenth Amendment.

This Court has consistently held that "the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland, supra* at 551-52 (1954). *See also, North v. Russell*, 427 U.S. 328, 338 (1976); *San Antonio School Dist. v. Rodriquez*, 411 U.S. 1, 28 n.66 (1973); *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 231 (1964); *Mallett v. North Carolina*, 181 U.S. 589, 598 (1901); *Chappell Chemical & Fertilizer Co. v. Sulfur Mines Co. of Virginia*, 172 U.S. 474, 475 (1899); *Hayes v. Missouri*, 120 U.S. 68, 71 (1886); *Missouri v. Lewis*, 101 U.S. 22, 29-32 (1880). The only classification created by § 84.830 is between Kansas City and other political subdivisions of the State of Missouri. The statute masks no underlying intent to discriminate against any class of individuals based upon their personal

characteristics or political beliefs. *Compare Griffin v. School Bd. of Prince Edward County, supra* at 231. It is not designed to provide governmental services of different quality to different cities within the state. *Cf. Clements v. Fashing, supra* at 974 (Stevens, J. concurring). And it affects all persons subject to its jurisdiction in an equal manner. Therefore, the classification created by the statute is not subject to scrutiny for a denial of equal protection under the United States Constitution.

Petitioner argues that those cases, in which the Court has rejected equal protection challenges to state statutes that apply to limited geographical areas, do not determine the validity of a statute that implicates fundamental rights. Petition for Writ of Certiorari at 4. But limiting the application of the rule that "territorial uniformity is not a constitutional prerequisite" to cases in which a rational basis standard of review is otherwise appropriate would deprive the rule of any independent constitutional significance. Moreover, the Court has in fact consistently applied the rule in cases that clearly involved fundamental rights.

McGowan v. Maryland, supra involved a challenge under the First Amendment and the equal protection clause of the Fourteenth Amendment to Sunday closing laws enacted by the state and applicable to certain counties within the state. In discussing the establishment clause issues, the Court noted that it had engaged "in the close scrutiny demanded of us when First Amendment liberties are at issue" and analyzed the statute under a least restrictive means test. *Id.* at 449-50.

In *Salsburg v. Maryland, supra*, the Court upheld a statutory scheme which permitted, only in the county in which the defendant was tried, the introduction of evi-

dence seized in contravention of the Fourth Amendment to the United States Constitution. Thus, the classification at issue impinged upon the defendant's rights of privacy and personal security. The Court had not yet held that the invasion of those rights required exclusion of the evidence in a state prosecution. *See Mapp v. Ohio*, 367 U.S. 643 (1961). But the Court had held that the rights invaded "are to be regarded as of the very essence of constitutional liberty; . . . as important and as imperative as are the guarantees of other fundamental rights of the individual citizen." *Gould v. U.S.*, 255 U.S. 298, 304 (1921).

North v. Russell, supra involved the defendant's fundamental right to liberty. Therefore, in analyzing the defendant's due process claim, the Court stated that "once it appears that confinement is an available penalty, the process commands scrutiny." *Id.* at 334.

Finally, in *San Antonio School Dist. v. Rodriquez, supra*, the plaintiffs argued that certain classifications created by Texas' system of subsidizing state financed school districts with local property taxes were subject to strict scrutiny under the equal protection clause, because the system interfered with the "fundamental" right of education. *Id.* at 29. In Part IIB of the majority opinion, the Court rejected the argument that the right of education is "fundamental." However, in Part IIA, the Court analyzed the classifications described by the plaintiff and implied that, had the classifications at issue been no more than territorial in nature, there would have been no need to proceed to the issue of whether education is a fundamental right. The Court stated:

> Appellees, however, have avoided describing the Texas system as one resulting merely in discrimination between districts per se since this Court has never ques-

> tioned the State's power to draw reasonable distinctions between political subdivisions within its borders. *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218, 230-31 (1964); *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salsburg v. Maryland*, 346 U.S. 545, 552 (1954).

San Antonio School Dist. v. Rodriquez, supra at 28 n.66.

Therefore, petitioner's argument, that the rule followed by the Eighth Circuit does not apply in cases that involve fundamental rights, is without merit.

Petitioner argues further that *Reynolds v. Sims*, 377 U.S. 533 (1964) and other legislative reapportionment cases contradict the holding of the Eighth Circuit. Petition for Writ of Certiorari at 8-10. He acknowledges that "these cases are different factually from the instant case", but asserts that they nonetheless provide a basis on which to invalidate § 84.830. In making that argument, petitioner misstates the holding of *Reynolds*.

The Eighth Circuit held that § 84.830 is not subject to review under the equal protection clause because "all persons within the jurisdictional reach of the statute are equally affected by the law." 796 F.2d at 1053. Petitioner argues that this holding contravenes *Reynolds* because the statute at issue therein "also treated all persons within its jurisdictional reach—all residents of the same legislative district—the same." Petition for Writ of Certiorari at 10. That statement is wrong. The statutes considered in *Reynolds* and in all legislative reapportionment cases applied throughout the state and impacted upon the voting rights of all citizens within the state. In each of those cases where the single statutory scheme was found to have impermissibly diluted the

voting rights of citizens living in certain districts, the statute was struck down precisely because it did not treat equally all persons within its jurisdictional reach. Thus, the *Reynolds* Court stated that "the concept of equal protection has been traditionally viewed as requiring the uniform treatment of *persons standing in the same relation* to the governmental action questioned or challenged." *Reynolds v. Sims, supra* at 565 (emphasis supplied). Petitioner does not stand in the same relation to the proscription of § 84.830 as do police officers employed in other political subdivisions of the State.

Under *McGowan* and the other cases followed by the Eighth Circuit, a regulation that would be constitutional if promulgated locally under a delegation of authority by the state is necessarily valid if enacted directly by the legislature. This doctrine could not apply in the context of the reapportionment cases. It is impossible for a state to grant to its local political subdivisions jurisdiction to decide how many representatives each will send to the state legislature. But a state can allow each of its political subdivisions to decide the proper forum for appeal from cases tried within the locality, *Missouri v. Lewis, supra,* the method of selecting juries in cases tried within the locality, *Hayes v. Missouri, supra,* the extent to which business will be conducted on Sundays within the locality, *McGowan v. Maryland, supra,* whether local judges must be lawyers, *North v. Russell, supra,* and whether police officers employed within the locality will be prohibited from making political contributions. When the state chooses to make those decisions for particular political subdivisions, according to the needs and desires of each, the equal protection clause of the Fourteenth Amendment is not implicated. *Salsburg v. Maryland, supra* at 552.

B. Section 84.830 Is Within the Leeway of the State Legislature to Determine Which of Its Employment Positions Require Restrictions on Partisan Political Activity and Which May Be Left Unregulated.

The Eighth Circuit held that, since the only classification created by § 84.830 is between the Kansas City Police Department and police departments located in other political subdivisions of the State, the statute was not subject to review under the equal protection clause. However, even had the Eighth Circuit undertaken an equal protection analysis, it would have been required to uphold the statute. The decisions of this Court establish that statutes which impose restrictions on the political activity of some, but not all, government employees do not violate the Fourteenth Amendment.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the court considered an argument that an Oklahoma statute violated the equal protection clause of the Fourteenth Amendment because it restricted the political activities of classified but not unclassified state employees. The court rejected that argument, stating:

> The contention is somewhat odd in the context of appellants' principal claim, which is that [the statute] reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. *See McGowan v. Maryland*, 366 U.S. 420 (1961). And a state can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

Id. at 607 n.5. On the same day that *Broadrick* was decided, the court affirmed the decision of a three-judge district court holding that Utah's proscription against political activity by certain state employees did not violate equal protection. *Elder v. Rampton,* 413 U.S. 902 (1973). Similarly, in *United Public Workers of America v. Mitchell,* 330 U.S. 75 (1946), the court held:

> Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. *Whether there are such differences and what weight to attach to them are all matters of detail for Congress. . . . The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress.* Courts will interfere only when such regulation passes beyond the general existing conception of governmental power.

Id. at 102 (emphasis supplied). Lower federal courts have consistently followed these cases in rejecting equal protection challenges to statutes that restrict the political activity of certain government employees. *Morial v. Judiciary Comm'n of Louisiana,* 565 F.2d 295, 305-06 (5th Cir. 1977); *Perry v. St. Pierre,* 518 F.2d 184, 186 (2d Cir. 1975); *Smith v. U.S. Civil Service Comm'n,* 520 F.2d 731, 735 (1975); *French v. Devine,* 547 F. Supp. 443, 449 (D.D.C. 1982).

Section 84.830 applies only to police officers and police civilian employees. Therefore, the only distinction between petitioner's equal protection argument and that rejected in *Broadrick* and the other cases cited above is that

this case involves restrictions on political contributions while those cases involved restrictions on direct political activity. In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court held that the right to make political contributions is entitled to a lesser degree of protection under the First Amendment than the right to engage in direct political activity. "By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or a political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. *See also, Federal Election Comm'n v. National Conservative Political Committee,* 470 U.S. ....., 84 L.Ed.2d 455, 470 (1985); *California Medical Ass'n v. Federal Election Comm'n,* 453 U.S. 182, 196 (1981). Therefore, the distinction between this case and *Broadrick* warrants the invocation of a less restrictive standard of review herein and the determination by the Missouri Legislature to limit to Kansas City the application of the restrictions of § 84.830 is *a fortiori* within the leeway that must be granted to the legislature under the standard prescribed by *Broadrick.*

CONCLUSION

The Court has previously denied a Petition for Certiorari raising an issue identical to that presented by this Petition. That question bears on no issues of national significance. The constitutionality of the challenged statute is settled by prior decisions of this Court. Thus, there are no "special and important reasons" for the Court to exercise its discretion to review the decision of the United States Court of Appeals for the Eighth Circuit on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KARL F. SCHMIDT
MORRISON, HECKER, CURTIS, KUDER & PARRISH
1700 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106-2370
(816) 842-5910

J. EMMETT LOGAN
MORRISON, HECKER, CURTIS, KUDER & PARRISH
14 Corporate Woods
8717 West 110th Street, Suite 520
P.O. Box 25217
Overland Park, Kansas 66225-5217
(913) 345-2700
Attorneys for Respondents